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IN THE

Supreme Court of the United States

PUBLIC UTILITY DISTRICT NO. 1 OF SNOHOMISH COUNTY, a municipal corporation in the State of Washington,

Petitioner,

v.

DYNEGY POWER MARKETING, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH DISTRICT

REPLY BRIEF FOR PETITIONER

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CORPORATE DISCLOSURE STATEMENT

Petitioner's corporate disclosure statement was set forth at page *ii* of its Petition for a Writ of Certiorari, and there are no amendments to that statement.

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Notwithstanding Respondents' substantial efforts to minimize conflicts, the decision below squarely conflicts with precedent from this Court and other circuits holding that (i) the filed rate doctrine does not apply in the absence of validly filed rates and (ii) the Federal Power Act ("FPA") does not preempt antitrust enforcement. Moreover, the petition presents the Court with an opportunity to resolve important and recurring federal issues that remain unsettled in the arena of deregulating electricity and natural gas markets.[1] The filed rate doctrine and the Ninth Circuit's expansive view of preemption have no place in a market-based regime, and the Court should accept review in order to reinforce its precedents establishing the narrowness of the filed rate doctrine and the limits of FPA preemption; reinforce the plenary role of state competition laws in deregulated markets; and rationalize conflicting law in the circuits on these issues. If this Court does not review the decision below, it will be used as precedent in scores of cases now working their way through the courts that arise from manipulation of the electricity and gas markets in various areas of the country. Dozens of cases will be influenced by the Ninth Circuit's startling departure from precedent.

1. The Ninth Circuit's decision squarely conflicts with precedent from this Court and other circuits holding that the filed rate doctrine does not apply in the absence of validly filed rates.

a. Respondents do not deny that this Court has never applied the filed rate doctrine to instances in which rates were not filed – the precise fact pattern at issue in this case. Instead, in an effort to minimize the manifest conflict between the Ninth

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[1] In stark contrast to the Ninth Circuit's omnibus rejection of the plethora of cases involving electricity markets, cases arising from the manipulation of natural gas markets during a similar time period continue to move forward in California state courts. For instance, on December 21, 2004, the California Court of Appeal, Fourth Appellate District, Division One, denied an interlocutory appeal in the *Natural Gas Antitrust Cases*. *See* Pet. at 10 n.11 (referencing trial court decision).

Circuit's ruling and this Court's prior decisions, Respondents offer a strained interpretation of *Entergy Louisiana, Inc. v. Louisiana Pub. Serv. Comm'n*, 539 U.S. 39 (2003), claiming that the tariff at issue need only dictate "how and by whom" rates will be established instead of setting forth the actual rates or formulae from which the actual rates can be derived. *See* Opp. 8-9. *Entergy* stands for no such proposition.

Entergy, and the two decisions upon which *Entergy* relied,[2] did not involve tariffs containing prices at which electricity was sold but, rather, tariffs setting forth the mechanisms by which FERC decides cost allocations from which state commissions establish retail rates. 539 U.S. at 42. To the extent that a state commission takes action that runs counter to FERC-approved cost allocations, the state order impermissibly "traps" costs that have been allocated in a FERC tariff and therefore impermissibly conflicts with that tariff. *Id.* at 49. Thus, there was a direct conflict between a state regulatory order and the costs specifically allocated by a FERC tariff. Of course, such a direct conflict between FERC and state agency action is not remotely at issue here, where rates – let alone costs – have not been determined by ***any*** regulatory body but left to the marketplace.

Furthermore, even though the tariff at issue in *Entergy* left certain cost allocation decisions to the discretion of an operating committee (*i.e.*, the cost allocations were not specific mandates), the statute at issue expressly authorized inclusion of such "automatic adjustment clauses" in the FERC-approved tariff, and the Court saw "no reason to create an exception to the filed rate doctrine for tariffs of this type that would substantially limit FERC's flexibility in approving cost allocation arrangements." *Id.* at 49-50. In contrast, here Congress has not modified the FPA to alter the rate filing requirements of Section 205.

Thus, *Entergy* does not in any way represent a contraction of the Court's strict requirement that ***rate*** tariffs contain all

[2] *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986); *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988).

essential elements before the filed rate doctrine will apply, as held in *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990), and *Security Servs. v. Kmart Corp.*, 511 U.S. 431, 439-40 (1994).

b. Respondents' reliance on *Town of Norwood v. New England Power Co.*, 202 F.3d 408 (1st Cir. 2000), is also misplaced. There, the relevant rates and termination charge were individually filed with FERC, *id.* at 419, rendering as *dicta* the court's prediction that the filed rate doctrine would apply as long as rates remained subject to a just and reasonable agency review. Such *dicta* is ***directly*** at odds with *Maislin*, *Security Services*, and *MCI Telcoms. Corp. v. AT&T*, 512 U.S. 218, 229 (1994), as this Court has never upheld application of the doctrine based on general principles of agency oversight.[3] Nor does *Elizabethtown Gas Co. v. FERC*, 10 F.3d 866, 870 (D.C. Cir. 1993), help Respondents because the court explicitly refused to reach issues related to the filed rate doctrine, which were not properly raised. *Id.* at 871.[4]

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[3] *Norwood* also conflicts with *Florida Mun. Power Agency v. Florida Power & Light Co.*, 64 F.3d 614, 616 (11th Cir. 1995) ("FP&L"), and *Electrical Dist. No. 1 v. FERC*, 774 F.2d 490, 495 (D.C. Cir. 1985), which held that the doctrine cannot apply in the absence of filed rates even where the relevant agency exercised extensive regulatory oversight. *See* Pet. 12-13. And *Norwood*'s application of the filed rate doctrine to the partially deregulated power industry has been rightly criticized as an obstacle to competitive markets because the doctrine values regulatory over market-price determinations. *See* Jim Rossi, *Lowering the Filed Tariff Shield: Judicial Enforcement for a Deregulatory Era*, 56 Vand. L. Rev. 1591, 1648 (2003).

[4] Nor did *Louisiana Energy & Power Auth. v. FERC*, 141 F.3d 364 (D.C. Cir. 1998), cited by Respondents in tandem with *Elizabethtown* (*see* Opp. 9), discuss the filed rate doctrine (or, for that matter, rates). Moreover, *Elizabethtown* held only that FERC could rely on "market discipline" to ensure just and reasonable rates. Of course, the availability of antitrust remedies helps maintain such market discipline.

c. Nor can Respondents effectively distinguish *Maislin*, *Security Services*, and *MCI*. Respondents claim that these decisions are "irrelevant" because they did not involve market-based tariffs. Opp. 9-10. Yet the regulatory regimes invalidated in this Court's plenary cases of *MCI* and *Maislin* are indistinguishable from FERC's shift to accepting market-based tariffs that do not contain rates. In each of those cases, the relevant agencies made rate filings optional where competitive forces were purportedly sufficient to ensure just and reasonable rates. *MCI*, 512 U.S. at 233; *Maislin*, 497 U.S. at 134. Here, a regime in which rates are not filed and reviewed by the agency *ex ante* is functionally equivalent to making rate filings optional. It is immaterial that FERC still requires the filing of a tariff. In *MCI*, *Maislin* ***and*** here, the fact remains that ***no*** rates were filed, and rates were not determinable or open to contemporaneous public inspection. Section 205(c) requires that the tariff contain "all rates and charges," and without rates, the doctrine ***cannot*** apply. *See also Security Servs.*, 511 U.S. at 439-40 (filed rate doctrine does not apply where the tariff lacks an essential element). As in *MCI*, "[w]hat we have here, in reality, is a fundamental revision of the statute, changing it from a scheme of rate regulation . . . to a scheme of rate regulation only where effective competition does not exist." *MCI*, 512 U.S. at 231-32.

The Ninth Circuit's decision thus squarely conflicts with this Court's decisions and those of at least two other circuit courts, because the market-based "umbrella" tariffs utilized by FERC constitute a blanket grant of authority to charge rates set in the market – rates that are not filed with, and reviewed by, FERC *ex ante* but which continually fluctuate with market prices. The decision below drastically departs from this Court's filed rate jurisprudence intended to narrowly proscribe application of this rule of immunity.

2. The Ninth Circuit expanded the scope of preemption in a manner that conflicts with other courts and invokes important and recurring federal issues that remain unsettled.

a. Respondents do not contest, nor could they, that FERC is powerless to enforce antitrust laws or impose antitrust penalties, because this point has been well settled for decades. *See, e.g., California v. Federal Power Comm'n*, 369 U.S. 482, 490 (1962); *see also Kirkwood v. Union Elec. Co.*, 671 F.2d 1173, 1178 (8th Cir. 1982); *Alabama Power Co. v. Federal Power Comm'n*, 511 F.2d 383, 393 (D.C. Cir. 1974).[5] Nonetheless, the decision below maintains that the FPA preempts all competition laws – leaving a huge regulatory gap clothing defendants with *de facto* immunity. The FPA's preemption of wholesale rate regulation simply does not extend to preempt antitrust law in the absence of rate regulation.

Not surprisingly, then, this Court applies competition laws to energy markets. *E.g., Otter Tail Power Co. v. United States*, 410 U.S. 366, 373-74 (1973). Respondents attempt to distinguish *Otter Tail* on the basis that it did not involve preemption of state remedies. Opp. 11. Yet *Otter Tail* and its progeny create a rule of general application: antitrust laws apply to the power industry – ***including the wholesale market*** – notwithstanding the broad regulatory reach of the FPA. Notably, no exception to this general rule can be found for instances in which preemption is raised as a defense to state law claims. Simply put, if the entire regulatory field of wholesale electricity was preempted, decisions such as *Otter Tail*, and *Groton v. Connecticut Light &*

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[5] FERC itself has repeatedly endorsed this principle. *See, e.g., San Diego Gas & Elec. Co. v. Sellers, 95 FERC ¶ 61,418, 2001 FERC Lexis 1440, at *95 (June 19, 2001)* (FERC cannot impose penalties or treble damages); *Energy Servs., Inc. & Gulf States Utils. Co.*, 64 FERC ¶ 61,326 at 63,404-05, 1993 FERC Lexis 1947, at *4 (Sept. 22, 1993) ("the Commission does not have jurisdiction to determine violations of the antitrust laws").

Power Co., 456 F. Supp. 360 (D. Conn. 1978), which provide for liability in the arena of wholesale electricity, would not exist.[6]

The Ninth Circuit decision also ignores this Court's holding that "[r]epeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions." *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 350-51 (1963). Applying competition laws to a ***market-based*** pricing regime in which no rates are filed cannot be plainly repugnant to the regulatory scheme. Indeed, if the FPA did not preempt all antitrust actions in the cost-based rate-filing era, it logically cannot preempt them now that market mechanisms determine rates. ***If anything, the range of preemption should be contracted, because there is less regulatory oversight and therefore a greater need for the effective policing of markets.*** The Ninth Circuit has thus failed to acknowledge this Court's very limited view of implied antitrust repeal and has created a precedent that dangerously expands preemption and thus creates a regulatory gap – one that allows blatant market manipulation by the likes of Enron – to go unchecked.

b. The Ninth Circuit's finding of omnibus preemption also conflicts with *Florida Mun. Power Agency v. Florida Power & Light Co.*, 64 F.3d 614 (11th Cir. 1995), where breach of contract and federal and state antitrust claims were brought against a utility for failing to provide network service. Although FERC had approved the rates associated with "point-to-point" transmission service, it had not approved any rates associated

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[6] The *Groton* court appropriately rejected an all-encompassing application of preemption and advocated a particularized inquiry into whether application of antitrust laws to wholesale electricity markets would interfere with FERC's regulatory scheme. *Id.* at 367. On the facts before it, the court ultimately concluded that it would not because FERC had never approved the anticompetitive conduct at issue. *Id.* The Ninth Circuit's omnibus preemption ruling here conflicts with the more enlightened *Groton* approach.

with network service. *Id.* at 615. Consequently, the court found that, even though the damage claims involved wholesale electricity rates subject to FERC regulation, those claims could proceed because FERC did not approve the specific rates in question. *Id.* at 616. Indeed, the court held that if no tariff specified the rate at issue, the district court could, "for the limited purpose of calculating damages, ***estimate the rate that would have been in effect but for the violation without infringing on the FERC's jurisdiction***." *Id.* at 617 (emphasis added).

Thus, the FPA does not universally bar damage awards in cases that involve wholesale electricity sales. The fact that damages for defendants' illegal trading practices may be calculated by estimating the price that should have been charged in the absence of such conduct does not "infringe[] on the FERC's jurisdiction" where no rates were approved in the first instance (and particularly where, as here, Snohomish had no long-term contracts with defendants). The Ninth Circuit's holding that a damages award would intrude upon and conflict with FERC jurisdiction therefore directly conflicts with *FP&L*. An award here would not change a single FERC-approved contract or rate but would instead provide a remedy for abusive conduct while leaving untouched the FERC-jurisdictional rate embedded in the market-based contracts.[7]

c. Overlooking *FP&L*, Respondents find no conflict between the decision below and *In re Mirant Corp.*, 378 F.3d 511 (5th Cir. 2004), purportedly because *Mirant* "did not involve

[7] The FERC proceedings that Respondents cite (Opp. 4-5) serve only to highlight the limitations on FERC's authority because any action that FERC may order is limited to revoking market-based rate authority and imposing refunds for tariff violations. Indeed, FERC acknowledged that it cannot "redress traumatic and inequitable circumstances like this" – let alone determine whether defendants conspired or colluded with other market participants or otherwise engaged in acts of unfair competition. *San Diego Gas & Elec. Co. v. Sellers*, 93 FERC ¶ 61,121, 2000 FERC Lexis 2168, at *98 (Nov. 1, 2000). Consequently, there is no reason that improper conduct cannot be both a violation of FERC tariffs ***and*** antitrust and consumer protection laws.

any preemption issue or state law claim." Opp. 12. But Respondents ignore the fundamental point established by the Fifth Circuit: FERC does ***not*** have exclusive jurisdiction over FERC approved rates where causes of action challenge something other than a filed rate. 378 F.3d at 519; *accord Gulf States Utils. Co. v. Alabama Power Co.*, 824 F.2d 1465, 1471-73 (5th Cir. 1987) (the FPA does not preempt actions to set aside contracts obtained unconscionably or by fraud).[8] This is precisely the issue presented here, because Snohomish does not challenge rates that were filed and approved by FERC. Therefore, the Ninth Circuit's finding that FERC need only "do[] enough regulation to justify federal preemption of state laws" notwithstanding the use of market-based rates conflicts with the Fifth Circuit's narrower view that preemption must be tied to rates approved by FERC.[9]

Finally, ***none*** of the preemption cases cited by Respondents addressed the deregulation engendered by FERC's move to market-based rates. They therefore do not delineate the scope of preemption in substantially deregulated regimes and leave open an important, recurring and unsettled issue for resolution by this Court at this time.

3. The Court should accept review and clarify that the filed rate doctrine and preemption should not abrogate competition law in a market-based regime.

FERC engineered a paradigmatic shift from cost-of-service-based regulation to a very different approach that monitors markets by focusing on the structure of those markets and

[8] That *Mirant* was a bankruptcy case is immaterial, because – for purposes of conflict analysis – the conflict would be the same whether the court proceeds under state law jurisdiction or in bankruptcy. Furthermore, *Gulf States*, upon which *Mirant* relied, did not involve bankruptcy.

[9] Nor do *Entergy* and *Nantahala* support the sweeping preemption applied by the Ninth Circuit below and advocated by Respondents. Opp. at 10, 12. As noted, those decisions are limited to the cost "trapping" scenarios resulting from state commission interference with cost allocation methodology expressly approved by FERC.

requiring only *ex post* information filings containing little information about pricing. This new paradigm, coupled with the Ninth Circuit's ruling below and its prior recognition that FERC "abdicat[ed] its regulatory responsibility" during the electricity crisis (*see* Pet. 25), leaves energy markets with a critical enforcement gap unsupported by the FPA and this Court's jurisprudence. As one commentator has astutely observed:

> Because agencies often lack the authority or resources to implement effective regulation of competitive markets, the doctrine not only thwarts price flexibility on the part of regulators and private firms, but also precludes much contract, tort, fraud, and antitrust litigation against – as well as state regulation of – utilities. This creates an enforcement gap, given the limited reach of federal agency regulation. . . . [T]he filed tariff doctrine contributes to a widening of the enforcement gap in deregulated markets. As formerly regulated industries move towards open market competition, establishing market norms becomes more important than ever. The filed tariff doctrine, however, can result in a type of radical deregulation – markets absent common law and antitrust protections. [Rossi, *supra* note 3, at 1596.]

Restraining the operation of laws designed to protect market competition abrogates Congressional intent, for Congress could not have intended to preempt competition law in a market-based regime when it never intended to preempt competition law in the prior regulatory era where FERC, and not market mechanisms, set rates. Consequently, the Ninth Circuit's automatic application of the filed rate doctrine and preemption results in radical and unintended deregulation and leaves consumers and businesses without fundamental market protections and remedies.

The immediate consequence of this ungrounded result is that thousands of businesses and millions of consumers will

bear the damages for what is widely acknowledged to be patent wrongdoing by defendants during the Western energy crisis. But the Ninth Circuit's departure from the narrow confines of the filed rate doctrine, and its over-expansive view of preemption, has broader consequences: it vitiates any role for default state norms in deregulating industries generally, effectively precluding the ability of state and federal governments to police markets. Indeed, because of the enforcement gap that results, the Ninth Circuit's decision, if left standing, could actually discourage future deregulatory efforts nationwide.[10]

Respondents fail to address these critical policy arguments. Instead, they fallback to the "bright line" rule employed by this Court in cases involving a direct conflict between state agency action and matters specifically approved by FERC. Opp. 7. But ***none*** of those decisions dealt with the intersection of FERC power and private antitrust enforcement in deregulating markets. Accordingly, guidance from the Court on these issues is critical, and this case presents an excellent vehicle in which to provide it, particularly given the magnitude of cases presently pending in federal and state courts relating to the Western energy crisis and involving identical threshold legal issues. *See* Pet. 9-10.

CONCLUSION

For the foregoing reasons and the reasons previously stated, the petition for a writ of certiorari should be granted.

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[10] The filed tariff doctrine arises from a regulatory regime that values regulatory over market-price determinations. But such regulatory regimes only work if regulators are exercising effective regulation, which did not happen during the Western electricity crisis. Lacking adequate means to enforce antitrust remedies themselves, regulators are likely to be discouraged from loosening the reins of regulation if courts preclude the enforcement of competition laws by other governmental actors and by private parties that might be victimized by Enron-style abuses.

Respectfully submitted,

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